84-1757

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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

No:

HELEN HELLMAN,
Petitioner

vs.

THE UNIVERSITY OF PITTSBURGH, and
JEROME ROSENBERG,
Respondents

Petition For Certiorari

PETITION FOR CERTIORARI FROM AN ORDER AND OPINION ENTERED BY THE THIRD CIRCUIT COURT OF APPEALS ON FEBRUARY 8, 1985 AT NO. 84-3446 AFFIRMING AN ORDER OF COURT DATED June 29, 1984, OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PA AT C.A. NO. 83-2678

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STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Where two people, one male and one female in the same faculty department, are both notified that they will not receive tenure, and where the decision as to the male is subsequently reviewed by one process while the female is instructed to follow a different review process, and where, following these review processes, the male receives tenure but the female does not, does the time within which the female must file her EEOC complaint begin to run *before* the date on which the male receives tenure?

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OPINIONS BELOW

The United States Court of Appeals for the Third Circuit issued a Memorandum Opinion which was submitted under Third Circuit Rule 12(6) on February 8, 1985, and filed on February 13, 1985. A copy of this Memorandum Opinion is contained in the Appendix hereto at pages 1-a - 9-a. The United States District Judge issued a Memorandum Opinion on June 29, 1984. A copy of that Memorandum Opinion is contained in the Appendix hereto at pages 10-a - 20-a.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 United States Code §1254(1), wherein it is provided, *inter alia,* that cases in the Courts of Appeals may be reviewed by the Supreme Court by Writ of Certiorari granted upon the Petition of any party to any civil or criminal case before or after rendition of judgment or decree.

Petitioner, Helen Hellman, seeks review of the Memorandum Opinion issued by the United States Court of Appeals for the Third Circuit on February 8, 1985, and filed on February 13, 1985.

STATUTES INVOLVED IN THIS CASE

Title 42 United States Code Section 2000e-5(e):

(e) Time for filing charges. A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be file by the Commission with the State or local agency.

STATEMENT OF THE CASE

On February 28, 1972, Petitioner herein, Helen Hellman (Hellman), a female member of the French Department of the Respondent University of Pittsburgh (University), and Benjamin Hicks (Hicks), a male member of the same department, were both advised by Respondent Jerome Rosenberg (Rosenberg) that they would not be granted tenure and that their employment would terminate at the end of the 1972-1973 academic year (Appendix, pp. 37-a, 38-a).

The tenured faculty of the French Department had previously recommended, by a vote of 7-0 with one abstention, to grant tenure to Hellman (App., p. 33-a). The tenured faculty had also voted to recommend tenure to Hicks, but only by a vote of 6-3 (App., p. 34-a). In other words, Hellman was considered qualified by more of her peers than Hicks for tenure.

Hellman requested that Rosenberg reconsider his decision and she submitted new information to him (App., p. 35-a), but on March 28, 1972, Rosenberg mailed an "official notification" of his tenure denial to Hellman (App., p. 37-a).

Hicks also requested that Rosenberg reconsider the February 14 refusal of tenure, and Rosenberg agreed to do so, as he had done with Hellman (App., p. 38-a).

Unlike Hellman, however, Hicks was successful in having Rosenberg reconsider his previous decision and on March 28, 1972, Rosenberg recommended to the University Provost, Rhoten Smith, that Hick receive tenure (Id.).

Smith, however, refused to accept the Rosenberg recommendation and, in a letter dated April 26, 1972, he

instructed Rosenberg to advise Hicks that tenure had been denied. (App., p. 40-a).

Smith wrote that "... while Dr. Hicks appears to have performed some services for the department acceptably, the overall record of performance just does not convince me of the kind of general strength we can and ought to expect before granting tenure .... I believe we should be rigorous in these decisions and extend tenure only when the case is clear and compelling." (Id.) Rosenberg advised Hicks by letter on April 28, 1972, that tenure had been denied him (App., p. 42-a).

A subsequent meeting between Hicks and Smith proved unsatisfactory for Hicks (App., p. 43-a).

As of April 28, 1972, therefore, neither Hellman, the female, nor Hicks, the male had been granted tenure.

Following receipt of Rosenberg's letter, Hellman asked to be advised of the procedures which she should follow to appeal the adverse tenure decision (App., pp. 48-a).

Rosenberg advised her that she had to pursue an appeal through the Faculty Tenure and Promotions Review Board, an appeal which could result only in a non-binding recommendation, not a direct reversal of the tenure denial (App., pp. 49-a to 50-a).

While Hellman was following the appeal procedure which Rosenberg had instructed her to follow, however, Smith, responding to Dr. Walter Albert, a supporter of Hicks within the French Department and in a letter marked "CONFIDENTIAL," advised Albert on how to go about obtaining a review of the Hicks tenure denial (App., p. 44-a).

Smith specifically laid out the criteria on which Hicks would have to offer proof in order to secure a reversal by the provost of the previous tenure denial (Id.).

In a note to Rosenberg on the subject, Smith indicated that he might go so far as to utilize an ad hoc committee for the purpose of taking evidence on the qualifications of Hicks for tenure (App., pp. 46-a to 47-a).

When supporters of Hellman, in March, however, had sought from Smith a similar review of the Hellman tenure denial, Smith had refused (App., pp. 26-a to 28-a).

Instead, on July 12, 1972, although she asked to be advised of any other review process, Hellman was given instructions by Rosenberg on how to invoke the non-binding review of the newly constituted Tenure and Promotions Review Board (App., pp. 49-a to 50-a). Accordingly, she proceeded to follow a procedure which could not result in a reversal of Rosenberg's decision unless he himself decided he wished to reverse it (App., p. 51-a). Rosenberg reiterated these instructions on September 22, 1972, and advised Hellman to meet with him in order to select the members of the review panel (App., p. 52-a).

Hicks, however, was not required to follow the Tenure and Promotions Review procedure. Instead, following a review by Smith, on November 3, 1972, approximately six months after being denied it, he was granted tenure (App., pp. 53-a to 54-a). On December 29, 1972, Chancellor Posvar officially approved the recommendation of the provost and Hicks became a tenured professor, effective retroactively to September 1, 1972 (App., p. 55-a).

As of November 3, 1972, therefore, Hellman, who had been recommended for tenure by her faculty with a higher vote than Hicks, was without tenure, and Hicks, who had

been previously deemed unworthy of tenure by the provost, was a tenured member of the faculty on the provost's recommendation.

As a result of and following the grant of tenure to Hicks, Hellman filed a complaint with the Equal Employment Opportunity Commission (EEOC) on January 26, 1973 (App., p. 30-a), 84 days after Hicks received tenure approval from the provost. This complaint, however, under the law as interpreted by this Court in *Mohasco Corp. v. Silver,* 447 U.S. 807 (1980), could not be considered to have been filed for another 60 days, which means it would have been filed as of 144 days after Hicks was granted tenure.

According to the record, the EEOC deferred the case to the Pittsburgh Commission on Human Relations on February 20, 1973 (App., p. 24-a) and filed it on June 25, 1973 (App., p. 25-a), 234 days after November 3, 1972, the day Hicks received tenure.

Hellman also continued the appeal process that she had been instructed by Rosenberg to follow. On February 6, 1973, a majority of the Tenure and Promotion Review Committee recommended that the adverse tenure decision as to Hellman be reversed and that she be granted tenure (App., pp. 56-a to 63-a).

Rosenberg, however, on March 1, 1973, refused the recommendation of the committee and reaffirmed his denial of Hellman's tenure (App., p. 64-a).

In her EEOC complaint filed on January 26, 1973, Hellman alleged that she was denied tenure while a less qualified male, Hicks, was granted tenure. The date of the filing was less than 240 days after the act which Hellman contends is the discriminatory act in this case—the grant

of tenure to Hicks—for before Hicks was granted tenure there was no apparent discrimination and no difference in the treatment by the University of a female and a male.

Following the filing by Hellman of her federal court complaint, Respondents filed a motion for summary judgment asserting, among other things, that the time within which Hellman was required to file her EEOC complaint began to run on February 28, 1972, or, at the latest, March 28, 1972, the date on which the official written notification of the adverse tenure decision was sent (App., pp. 21-a to 23-a).

The District Court Judge granted the motion.

The District Court held that the time within which Hellman had to file her EEOC Complaint began to run no later than March 28, 1972. The court rejected Hellman's contention that the use of different procedures whereby the Hellman and Hicks tenure denials were reviewed and the subsequent grant of tenure to Hicks in November, 1972, constituted ongoing discriminatory conduct (App., 11-a to 20-a).

"Under this theory," the court said, "in order to establish that defendants' discriminatory acts continued up to March 1, 1973, plaintiff would have to allege and prove that the manner in which her non-tenure decision was upheld differed discriminatorily from the manner in which the decision as to Hicks was reversed. But Plaintiff has failed to allege or otherwise even to create a genuine issue of fact by affidavit or other means in opposition to defendant's motion for judgment, that the *procedures* utilized by defendants in reviewing their decision denying plaintiff tenure departed from or in any way violated, defendants' established internal procedures."

The United States Court of Appeals for the Third Circuit affirmed.

The Circuit Court made the assumption that Hellman accepted the March 28, 1972, date as the date on which the EEOC time limit began to run and held that even if the EEOC time limits were computed from that date, this Court's decision in *Mohasco,* supra, rendered an EEOC complaint filed on January 26, 1973, untimely.

The Circuit Court, applying *Delaware State College v. Ricks,* 449 U.S. 250 (1980), held that the limitations period began to run when the original tenure decision was made and communicated to the affected party, and that the resort by Hellman to an internal review procedure could not toll the running of the time limit.

With regard to Hellman's primary argument, however, that the University engaged in an ongoing course of discriminatory conduct that included a discriminatory review procedure and culminated in a grant of tenure to Hicks, the Circuit Court stated that under *Ricks,* Hellman would have to have alleged that the manner in which her tenure denial was reviewed differed discriminatorily from the manner in which her male colleague's tenure denial was reviewed.

The Court concluded, however, that "Neither the allegation in Hellman's complaint nor any affidavits create an issue of fact regarding departure by the University *from its established internal review procedures.*" (emphasis added)

This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court has decided a federal Question in a way in conflict with applicable decisions of the Supreme Court.

In *Delaware State College v. Ricks,* 449 U.S. 250 (1980), this court said:

> In order for the limitation periods to commence with the date of discharge, Ricks would have had to allege and prove that the manner in which his employment was terminated differed discriminatorily from the manner in which the College terminated other professors who also had been denied tenure.

Ricks taught that a complainant, alleging a discriminatory discharge must identify "the discriminatory acts that continued until, or occurred at the same time of, the actual termination of his employment." 449 U.S. at 258.

In *Ricks,* this court cited with approval the decision of the Circuit Court of Appeals for the Ninth Circuit in *Abramson v. University of Hawaii,* 594 F.2d 202 (1979), which pointed out that independent acts of discrimination occurring *after* notification of the adverse tenure decision *could* form the basis of a Title VII claim.

Such an independent discriminatory act might occur, the *Abramson* court said, if the policy of the University included a normal and generally accepted tenure review decision process and if the University's refusal to review the tenure denial itself constituted a discrimination.

In the context of Respondents' Motion for Summary Judgment before the District Court, therefore, Hellman, under *Ricks* and *Abramson,* had the burden only of showing that a genuine issue of material fact existed with regard

to whether the review procedures followed by the University *after* notice to both Hellman and Hicks that they would not receive tenure differed discriminatorily and resulted in tenure for the male but not the female.

The Circuit Court held, however, that in order to prevail in this case, Hellman would have to allege and prove that her discharge or tenure review process differed from process which the University *ordinarily followed* in discharging or reviewing.

The Circuit Court held, as the District Court had held, that Hellman had failed in her case because she had failed to allege that the procedures used by the University in reviewing the tenure denial departed from or in any way violated the established internal review procedures.

Hellman contends, however, that the test enunciated by the Circuit Court was in error and in violation of the law related to ongoing discriminatory conduct as set forth by this Court. Hellman argues that her burden was to show that the manner in which her adverse tenure decision was reviewed differed discriminatorily from the manner in which the adverse tenure decision as to a similarly situated male employee was reviewed, and that the differing review process resulted in tenure for the male but not for her.

A review of the record, moreover, reveals convincingly that Hellman *in fact* showed that the review process for the male that resulted in tenure did *not* follow established procedures, and that while she was required to follow an established University tenure review procedure, the male was not.

Hellman contends that as a matter of law, the record before the District Court was sufficient to raise a substantial question of fact as to whether the University, through

its authorized agents, committed ongoing discriminatory acts by subjecting Hellman's tenure denial to a review process that differed from the process used to review the tenure denial of a similarly situated male employee whose tenure review resulted in a reversal of the denial and a grant of tenure, while Hellman's tenure denial was affirmed.

The differences in tenure review which resulted in tenure for the male employee and no tenure for the female were *more* than merely the ongoing effects of a past discrimination. Cf. *United Air Lines, Inc. v. Evans,* 431 U.S. 553 (1977).

The record of affidavits and documents submitted to the District Court indicates the following:

1. On or about February 14, 1972, both Hellman, the female employee, and Hicks, the male employee, were advised by Rosenberg that they had been denied tenure (App., pp. 29-a, 38-a, 42-a). Both requested that Rosenberg reconsider the denial (App., pp. 35-a, 38-a).

2. On or about March 28, 1972, Rosenberg formally confirmed his tenure denial as to Hellman (App., p. 29-a), but reversed himself as to Hicks and recommended Hicks for tenure. (R.R., p. 330).

3. On April 26, 1972, however, the Provost refused the recommendation of Hicks for tenure and instructed Rosenberg to so advise Hicks (App., p. 40-a). This was done on April 28, 1972 (App., p. 42-a).

As of April 28, 1972, therefore, Hellman had no cause of action under Title VII because no similarly situated male employee had been treated differently and better than

she had. Two employees, one male and one female, were out of their jobs at the end of the 1972-73 academic year.

Up to April 28, 1972, the normal University procedure had been followed, if one accepts Rosenberg's deposition testimony on this matter (App., pp. 31-a to 32-a).

Thereafter, however, the University began a course of discriminatory conduct culminating in a grant of tenure for Hicks, but not for Hellman.

Based on the facts contained in the record before the District and Circuit Courts, Hellman clearly raises a substantial question of fact with regard to the period during which her EEOC filing time limit began to run.

Both Hellman and Hicks sought to have their adverse tenure decisions reviewed (App., pp. 43-a, 44-a, 48-a).

Hellman is advised and instructed to follow the procedure to be pursued through the Tenure Promotion and Review Board (App., pp. 49-a to 50-a, 52-a).

On July 6, 1972, she *specifically* asks Rosenberg if there is any *other* avenue of appeal open to her (App., p. 48-a). She is told only that she may follow the Tenure and Promotions Review procedure, for which rules are just being implemented (App., pp. 49-a to 50-a).

In the meantime, Smith has confidentially re-opened the Hicks case (App., p. 44-a) in a procedure which does *not* appear to be part of the normal tenure review process.

In justification for this move, Smith qualifies his earlier evaluation of Hicks as one *not* deserving of tenure. He specifically instructs the acting chairman of the department of the factors on which evidence would have to be presented in order for Hicks to receive tenure.

Having specifically rejected Hicks teaching ability as sufficient for tenure in April, 1972 (App., p. 40-a), Smith directly instructs Albert that in order to win tenure for Hicks evidence must be offered on Hicks' teaching performance.

Hellman received no such instruction and no such opportunity.

Hellman contended to the District Court, to the Circuit Court, and now to this Court, that Respondents engaged in a course of discriminatory conduct by subjecting these two tenure denials to two different review procedures. One employee, the female, was instructed to follow one review procedure which could not and did not result in tenure. One employee, the male, was instructed to follow a different procedure which could and did result in tenure. The inference may be drawn, moreover, that the review of the male's tenure denial was *not* in accordance with established University procedure. The further inference may be drawn from the evidence that Hellman was qualified for tenure while Hicks was not.

The male received tenure on November 3, 1972. Until the male, instructed to follow a different review procedure than the female, received tenure in November, 1972, no discrimination could be charged to the University. Prior to that time, both employees, one male and one female, had been denied tenure.

In *Abramson,* the Court wrote, 594 F.2d at 209:

> A discriminatory refusal to reconsider a denial of tenure on or after March 24, 1972, can be viewed either as an additional discriminatory act or as the final denial of tenure.

Under the facts of that case, the faculty member was given an opportunity on remand to show that she had been discriminated against during the tenure denial review process since she had been refused a review of her tenure denial when other similarly situated faculty members had been granted routine review of their tenure denial.

Analogously, Hellman has created on the record a genuine issue of fact with regard to whether the grant of tenure to Hicks following one tenure denial review process was discriminatory as to Hellman who has not accorded the same review and who did not receive tenure.

Since it is the review process and subsequent tenure review decisions—favorable for Hicks, unfavorable for Hellman—which are the focus of Hellman's claim and *not* the original tenure denials, the time within which she had to file her EEOC Complaint did not begin to run until, at the earliest, Hicks received tenure.

Accordingly, Hellman's claim that she had been treated differently than Hicks, a less qualified, similarly situated male employee, could not be filed before November 3, 1972.

Since Hellman's complaint was, even under the rules set out in *Mohasco*, filed within 300 days of the discriminatory conduct, her complaint was timely and her lawsuit should not have been summarily dismissed.

CONCLUSION

For the foregoing reasons, this Honorable Court is requested to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit to review the decision of that court which affirmed the summary dismissal of Petitioner's case.

Respectfully submitted,
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/s/ STANLEY M. STEIN

STANLEY M. STEIN, ESQ.
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CERTIFICATE OF SERVICE

I, STANLEY M. STEIN, hereby certify that a true and correct copy of the foregoing Petition for Certiorari has been served on counsel of Appellees as follows:

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Said copy was served by hand delivery on the *8th* day of May, 1985.

/S/ STANLEY M. STEIN

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APPENDIX TO PETITION FOR CERTIORARI

Petition for Certiorari from an Order and Opinion Entered by The Third Circuit Court of Appeals on February 8, 1985 at No. 84-3446 Affirming an Order of Court dated June 29, 1984, of the United States District Court for the Western District of PA at C.A. No. 83-2678

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-3446

HELEN HELLMAN,

Appellant

v.

JEROME ROSENBERG and
THE UNIVERSITY OF PITTSBURGH

No. 84-3489

HELEN HELLMAN,

v.

JEROME ROSENBERG and
THE UNIVERSITY OF PITTSBURGH

Appellees

On Appeal from the Order of the United States District Court for the Western District of Pennsylvania (D.C. Civil No. 83-2678) Sat Below: Honorable Gustave Diamond

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Submitted under Third Circuit Rule 12(6)
February 8, 1985

(Filed Feb. 13, 1985)

BEFORE: GARTH and BECKER, *Circuit Judges*
and ROSENN, *Senior Circuit Judge*

MEMORANDUM OPINION OF THE COURT

GARTH, *Circuit Judge:*

Helen Hellman appeals a grant of summary judgment in favor of her former employer, the University of Pittsburgh and Jerome Rosenberg, Dean of the Faculty of Arts and Sciences. The University takes a cross appeal, arguing that summary judgment in its favor should have been granted as a matter of law on all grounds argued below. Hellman, an associate professor who held a two-year non-tenured appointment from September 1, 1971 to April 30, 1973, claims that the University violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* by denying her academic tenure because of her sex.

On February 14, 1972, Dean Rosenberg informed Hellman that she would not receive tenure and that her appointment would not be renewed. Written notice to this effect was sent to Hellman on March 28, 1972. Although Hellman appealed this adverse tenure decision to an internal review board and although the board supported Hellman's tenure candidacy, Rosenberg's decision remained final. On January 26, 1973, during the pendency of the internal review process, Hellman also lodged a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC). More than ten years later, the EEOC issued a right to sue letter and Hellman commenced this action.

The essence of Hellman's complaint is that a similarly situated male professor, whose tenure Rosenberg initially disapproved, was recommended for a tenured position after

Rosenberg reconsidered his decision. Although Rosenberg also reconsidered Hellman's tenure recommendation between the initial February 14 notification and the March 29 confirmation, Hellman alleges her tenure denial was sustained solely because of impermissible sex discrimination.

The University moved for summary judgment as a matter of law of three separate grounds: (1) that at the time of the alleged discriminatory denial of tenure, the University was not subject to Title VII; (2) that Hellman's complaint to the EEOC was filed beyond the applicable limitations period and hence her Title VII claim was untimely; and (3) that Hellman's claim was barred by the equitable doctrine of laches. Although the district court found a genuine issue of fact existed as to whether Hellman was notified of her tenure denial prior to the date Title VII was made applicable to state educational institutions, the court nonetheless concluded that Hellman's EEOC claim was untimely.[1] Because the conclusion that Hellman's claim was time-barred was dispositive, the court had no need to consider the University's equitable arguments.

The standards for awarding summary judgment are set forth in Rule 56, Fed.R.Civ.P., which provides that such judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

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1. The University's cross-appeal is limited to the district court's decision that a factual issue existed as to whether Hellman was effectively notified of her tenure denial prior to the time Title VII was made applicable to the University. Obviously, were Title VII deemed inapplicable, Hellman's complaint would be dismissed for failure to state a claim upon which relief could be granted. An inability to fix the notice of tenure denial prior to the effective date of Title VII did not, however, under the facts of this case, prevent the district court from considering whether Hellman's EEOC complaint was timely filed.

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). On review, this court is required to apply the same test the district court should initially have applied. We must therefore resolve all inferences in favor of the non-moving party and accept all the non-movant's allegations as true. *See Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied.* 429 U.S. 1038 (1977). Having carefully examined the present record in light of these standards, we affirm the grant of summary judgment.

I.

Title VII, as originally enacted, exempted from its coverage "an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution." Pub. L. 88-352 §702 (1964). Congress eliminated this exemption, effective March 24, 1982, [sic] by section 3 of the Equal Employment Act of 1982, [sic] codified as 42 U.S.C. §2000e-1. Because the 1972 amendments were to be given no retroactive application, *see Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639 n.8 (1974); *Abramson v. University of Hawaii*, 594 F.2d 202, 208 (9th Cir. 1979); *Weise v. Syracuse University*, 522 F.2d 397, 411 (2d Cir. 1975), only acts of discrimination occurring after March 24, 1982 [sic] are actionable.

In the present case, the University contends Hellman was orally notified of her tenure denial on February 14, 1972, prior to the effective date of the Act. It is undisputed that Rosenberg first met with Hellman on that date and told her she would not be granted tenure. When deposed, however, Rosenberg testified that University procedures required faculty members to receive written notice of adverse tenure decisions. Hellman did not receive such notice until March 28, 1972, four days after the Act went into effect. Moreover, since Rosenberg, at

Hellman's request, had agreed to reconsider his tenure decision during the interval between February 14 and March 28, 1972, it is at least arguable whether the decision was made and whether Hellman had effective notice of her tenure denial prior to March 28, 1972. In view of the favorable inferences to which Hellman as the non-moving party is entitled, we agree that a sufficient issue of act exists to preclude entry of summary judgment on the ground that the tenure decision was made within the period of exemption.[2] Accordingly, the University's cross-appeal must be denied.

Yet, even if March 28, 1972 is deemed the controlling date, summary judgment is proper because Hellman's EEOC claim was not timely filed. Title VII provides that state employment practice agencies have primary jurisdiction over employment discrimination complaints. If an alleged unlawful employment practice occurs within a state or locality having a law prohibiting such a practice, an aggrieved person cannot file a charge with the EEOC until 60 days have elapsed after the commencement of state or local proceedings. 42 U.S.C. §2000e-5(c). Only then can resort be had to the EEOC, provided that charges are filed not more than 300 days after the alleged unlawful practice or 30 days after the termination of state or local proceedings, whichever is earlier. 42 U.S.C. §2000e-5(e).

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2. Our decision on this point should not be construed to impose a requirement that written notice of tenure denial must be received to commence the running of the statute of limitations period in a Title VII case. In Delaware State College v. Ricks, 449 U.S. 250, 259 (1980), the Supreme Court held that the limitations periods begin to run when a tenure decision is made and the Title VII claimant receives notice of that decision. The times at which a decision is made and notice is received are necessarily factual inquiries to be undertaken on a case-by-case basis. Here we merely decide that a factual issue exists as to whether the decision and notice were complete on the earlier or later date.

Hellman lodged a charge of sex discrimination with the EEOC on January 26, 1973. On February 20, 1973, in accordance with Title VII's deferral provision, the EEOC referred Hellman's charge to the Pittsburgh Commission on Human Relations. As the Supreme Court made clear in *Mohasco Corp. v. Silver*, 447 U.S. 807 (1979), a literal reading of the statute requires that a complaint first sent to the EEOC cannot be deemed filed in a deferral state until after the lapse of the 60-day period. In the present case, sixty days after February 20, 1973 would yield a filing date of April 21, 1973. This is 387 days beyond March 8, 1972. Under the rule of *Delaware State College v Ricks*, 449 U.S. at 259, that the limitations period begins to run when a tenure decision is made and communicated to the affected party, Hellman's claim is untimely.[3]

To avoid the bar of the limitations period, Hellman argues: (1) that her appeal to the tenure review board should extend the operative date of her tenure denial to either the date of the board's recommendation (February 6, 1973) or the date of Rosenberg's rejection of that recommendation (March 1, 1973); or (2) that the University engaged in either a continuing course of discriminatory conduct or a series of independent discriminatory acts by according a male colleague a different review process ultimately culminating in a grant of tenure.

With respect to Hellman's first argument, the *Ricks* Court made clear that resort to an internal review procedure cannot

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3. The limitation period for filing discrimination claims in non-deferral states is 180 days. 42 U.S.C. 2000e-5(e). As the *Mohasco* Court noted, the 300-day limitation period in deferral states in effect gives complainants an additional 60 days in which to file a charge and still preserve their federal rights. 447 U.S. at 822. A corollary is that, a complaint sent to the EEOC after the 240th day will be untimely even if it is promptly referred to the relevant state or local agency. Thus, in the present case, even if the EEOC had referred Hellman's charge on January 27, 1983, the eventual filing with the EEOC would have been untimely.

be held to vitiate the finality of a tenure decision such that the operative date of the decision itself is delayed. As the Court stated, "[t]he grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made." 449 U.S. at 261 (emphasis in original). Nor can collateral review of an employment decision toll the running of the limitations period. *Id.*

With respect to Hellman's second argument, the *Ricks* decision suggests that a theory alleging a course of discriminatory conduct may be supported if an aggrieved party identifies alleged discriminatory acts continuing until, or occurring at, the time of actual termination of employment. 449 U.S. at 257. To extend the date from which the limitations period began to run, Hellman would have to allege that the manner in which her tenure denial was reviewed differed discriminatorily from the manner in which her male colleague's tenure denial was reviewed. Neither the allegation in Hellman's complaint nor any affidavits create an issue of fact regarding a departure by the University from its established internal review procedures.[4] That a different outcome resulted for Hellman and her male colleague cannot alone constitute discriminatory conduct which lifts the bar of the limitations period.

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4. In her briefs before this court, Hellman argues that a discriminatory departure from established procedures occurred because the male professor was recommended to the Provost for tenure after Rosenberg reconsidered and approved his candidacy, while Hellman, after Rosenberg reconsidered and disapproved her candidacy, was told to appeal to the review board. Not only does this argument ignore the fact that the relevant point of comparison is Rosenberg's reconsideration of each professor's tenure bid after an initial denial, but this argument forms no part of the prior record in this case. Moreover, if a University maintains different procedures for successful and unsuccessful tenure candidates, that alone cannot be said to be impermissible discrimination, unless initial screening and review procedures were themselves shown to be discriminatory. Hellman has failed to raise any issues of fact with respect to such procedures.

Because we conclude Hellman's charge was not timely filed, we need not address the University's equitable arguments. The judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

.....

Circuit Judge

IN THE
District Court of the United States
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

HELEN HELLMAN,

Plaintiff,

v.

JEROME ROSENBERG and
THE UNIVERSITY OF PITTSBURGH,

Defendants.

Civil Action
No. 83-2678

ORDER OF COURT

AND NOW, this 29th day of June, 1984, for the reasons stated in the memorandum opinion filed this date in the above-captioned action, IT IS ORDERED that defendants' motion for summary judgment be, and the same hereby is, granted.

Gustave Diamond
United States District Judge

cc: Stanley M. Stein, Esq.
Feldstein, Grinberg, Stein & McKee
428 Boulevard of the Allies
Pittsburgh, Pa. 15219

James J. Restivo, Jr., Esq.
Martha H. Munsch, Esq.
Michael J. Betts, Esq.
Reed, Smith, Shaw & McClay
747 Union Trust Building
Pittsburgh, Pa. 15219

IN THE
District Court of the United States
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

HELEN HELLMAN,

Plaintiff,

v.

JEROME ROSENBERG and
THE UNIVERSITY OF PITTSBURGH,

Defendants.

Civil Action
No. 83-2678

MEMORANDUM OPINION

DIAMOND, J.

Plaintiff brought this action for damages and other relief under Title VII of the Civil Rights Act of 1964, (hereafter, sometimes, the "Act") 42 U.S.C. §2000e, et seq. on the grounds that in denying plaintiff tenure as a professor at the University of Pittsburgh ("University"), defendants discriminated against plaintiff because of her sex in violation of §703 of the Act, 42 U.S.C. §2002e-2(a)(1). Presently before the court is a motion for summary judgment filed by the defendants, Jerome Rosenberg and The University of Pittsburgh. For the reasons set forth below, the motion will be granted.

Defendants contend that they are entitled to summary judgment as a matter of law on each of three grounds:

A) At the time of the alleged discriminatory conduct, the defendant University was not subject to the Act, and

therefore plaintiff has failed to state a claim upon which relief can be granted;

B) Plaintiff's complaint to the Equal Employment Opportunity Commission (EEOC) was untimely filed, and, therefore, her claim is barred by the applicable statute of limitations; and,

C) Plaintiff's claim is barred by the doctrine of laches.

The chronology of events and the facts essential to the resolution of defendants' motion are not in dispute.

In the summer of 1970, plaintiff was offered a position with the University as an associate professor in the Department of French and Italian Languages and Literatures ("Department"). Later, in the fall of 1970, the chairman of that Department asked plaintiff if she would be interested in staying on permanently as associate professor with tenure. Nothing further of significance developed in that regard until June 1971, when plaintiff was offered a two-year appointment without tenure by defendant Rosenberg, who then held the position of Dean of the Faculty of Arts and Sciences. Plaintiff's contract was to run from September 1, 1971, to April 30, 1973. Subsequently in March 1971, and again in December 1971, plaintiff was voted eligible for tenure by the tenured faculty members of the Department, but in each instance defendant Rosenberg declined to recommend plaintiff for tenure to the Provost of the defendant University, and plaintiff did not receive tenure. On February 14, 1972, defendant Rosenberg orally notified plaintiff that she would not receive tenure, but subsequently Rosenberg agreed to review that decision. On March 28, 1972, the same date on which he wrote to the Provost recommending a male member of the Department for tenure (reversing his initial decision as to that person), defendant Rosenberg also wrote to plaintiff advising her that his

earlier decision refusing to recommend her for tenure would stand.

Following receipt of defendant Rosenberg's letter of March 28, 1972, plaintiff sought review of the adverse decision through an appeal to the defendant University's Tenure and Promotions Review Board ("Board"). A hearing was held by the Board, which submitted its findings and recommendation in favor of plaintiff in a detailed report published on February 6, 1973. Nevertheless, on March 1, 1973, defendant Rosenberg again wrote to plaintiff stating that he had decided to let his original decision stand "not to recommend that [plaintiff's] appointment at the University of Pittsburgh be extended beyond April 30, 1973." Hence, plaintiff's contract was not renewed beyond its expiration date, and her employment by defendant University was terminated.

Earlier, on January 26, 1973, plaintiff had filed a complaint directly with the EEOC. Ten and a half years later, on June 21, 1983, the EEOC issued its determination, finding reasonable cause to believe plaintiff's allegation of sex discrimination to be true. In October 1983, following the issuance of a notice of right to sue by the EEOC, plaintiff filed the instant suit.

One who seeks summary judgment has the burden of proving that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Adickes v. Kress & Co.*, 398 U.S. 144 (1970).

A. Is Title VII Applicable to Defendants?

The defendants first content that they are entitled to summary judgment because when the alleged acts of discrimination in this case occurred, the Act did not apply to state educational institutions. Title VII of the Act was amended on March 24, 1972, to include state educational institutions. 42

U.S.C. §§2000e, 2000e-1. This amendment became effective on March 24, 1972, and did not have retroactive application. *See, Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 639 n.8 (1974). In *Delaware State College v. Ricks,* 449 U.S. 250, 259 (1980) the Court held that the limitations periods applicable to employment discrimination actions under Title VII commenced to run in a tenure case when the tenure decision was made and communicated to the aggrieved party. We believe that standard for determining the accrual date of the discriminatory act should apply as well here to our determination of whether the alleged acts of discrimination against plaintiff occurred after the Act became applicable to defendants.

Defendants contend that the tenure decision, the alleged discriminatory act, was made and plaintiff was notified no later than February 14, 1972, the date on which defendant Rosenberg orally notified plaintiff that she would not receive tenure, and that therefore summary judgment should be granted, since the Act did not apply to defendants until March 24, 1972.

However, defendant Rosenberg testified at his deposition (p. 22) that it was the practice in the Faculty of Arts and Sciences to give *written* notice of tenure decisions. It is undisputed that defendant Rosenberg did not notify plaintiff of the tenure decision in writing until March 28, 1972, four days after the effective date of the amendment to Title VII of the Act. At the very least, therefore, a genuine issue of fact exists as to when effective notice of the tenure decision was communicated to the plaintiff. That issue of fact is sufficient to preclude entry of summary judgment on defendants' first ground. *Adickes v. Kress & Co., supra.*

B. Plaintiff's Complaint to EEOC Barred By the 300-Day Limitations Period.

Defendants next claim that they are entitled to summary judgment because plaintiff filed her complaint with the EEOC beyond the 300-day limitations period of the alleged discriminatory conduct.

Under §706(e) of Title VII, 42 U.S.C. §2000e-5(e), where charging parties have initially instituted proceedings with a state or local agency, complaints of discrimination must be filed with the EEOC within 300 days of the alleged unlawful practice. Since plaintiff filed her complaint directly with the EEOC on January 26, 1973, and had not first filed with the Pennsylvania Human Relations Commission ("PHRC") as she was required to do under §706(c), 42 U.S.C. §2000e-5(c), the EEOC referred her charge to the PHRC on February 20, 1973, because §706(c) also provides that no charge may be "filed" with the EEOC before the expiration of 60 days after proceedings have been commenced in the appropriate state agency. In *Mohasco Corp. v. Silver,* 447 U.S. 807 (1980), the Court held that a complaint first sent only to the EEOC which it promptly referred to the appropriate state agency was not "filed" with the EEOC for purposes of §706(e) until at least 60 days after the referral to the state agency. Thus, taking February 14, 1972, as the date when the alleged act of discrimination occurred, defendants calculate that 431 days passed before plaintiff's complaint was effectively filed with the EEOC. (February 20, 1973 + 60 days = April 21, 1973, which is 431 days after February 14, 1972.) Moreover, defendants argue, even if the date on which written notification was sent to plaintiff, March 28, 1972, is taken as the effective date of the discriminatory act, a period of approximately 387 days had intervened before the EEOC filing date.

Plaintiff contends, however, that her appeal to the Tenure and Promotions Review Board and the subsequent rejection by defendant Rosenberg on March 1, 1973, of that Board's recommendation of February 6, 1973, should extend the operative date of her tenure denial to at least one of those dates. But the Supreme Court in *Ricks, supra,* 398 U.S. at 448 n.15, held that although aspirants for academic tenure should not ignore available opportunities to request reconsideration of tenure denials, "mere requests to reconsider, however, cannot extend the limitations periods applicable to the civil rights laws."

Moreover, citing *Electrical Workers v. Robbins & Myers, Inc.,* 429 U.S. 229 (1976), the Supreme Court in *Ricks* held that the pendency of a grievance or some other collateral review of an employment decision, does not toll the running of the limitations period—the grievance procedure being a *remedy* for a decision *already made,* rather than an opportunity to influence a decision *before it is made.* Since plaintiff's appeal to the Tenure and Promotions Review Board was clearly part of a grievance procedure or some other collateral review of an employment decision, it would appear that it did not operate to extend the limitations period under the Act and that summary judgment, therefore, should be granted.

Plaintiff, however, argues that the EEOC charge was timely nevertheless because the defendants' acts of discrimination continued after March 28, 1972, up to as late as March 1, 1973, when defendant Rosenberg wrote to plaintiff advising her that he had rejected the recommendation of the Tenure and Promotions Review Board that plaintiff be granted tenure. Citing *Abramson v. University of Hawaii,* 594 F.2d 202 (9th Cir. 1979), a case cited with approval in *Ricks,* plaintiff contends that the proper focus for determining the operative date is the time of the latest discriminatory act. In other words, plaintiff maintains that if she can identify independent discrim-

inatory acts which occurred after the initial official notification that she had been denied tenure, those acts will extend the date for the commencement of the running of the statute. Plaintiff's point here is that the granting of tenure to a male colleague (Hicks) in the same department as plaintiff constituted an ongoing discriminatory act which continued up to March 1, 1973, when defendant Rosenberg notified plaintiff that despite her successful appeal to the Board he had not changed his position with regard to her tenure. Plaintiff argues that the defendants continued to discriminate against her in that defendants reviewed and reversed their decision denying tenure to Hicks even though he had received fewer votes from the tenured faculty (5 for and 3 against) than plaintiff (7 for and 1 abstention), but persisted in denying tenure to plaintiff notwithstanding the favorable recommendation of the Tenure and Promotions Review Board.

In *Weise v. Syracuse University*, 522 F.2d 397 (2d Cir. 1975), the court held that a discriminatory refusal to *reconsider* an employee's termination was sufficient to constitute Title VII discrimination where the process resulting in the refusal to reconsider was in violation of the employer's own established procedures. Under this theory in order to establish that defendants' discriminatory acts continued up to March 1, 1973, plaintiff would have to allege and prove that the *manner* in which her non-tenure decision was upheld differed discriminatorily from the *manner* in which the decision as to Hicks was reversed. But plaintiff has failed to allege or otherwise even to create a genuine issue of fact by affidavit or other means in opposition to defendants' motion for summary judgment, that the *procedures* utilized by defendants in reviewing their decision denying plaintiff tenure departed from, or in any way violated, defendants' established internal review procedures. Plaintiff, thus, has failed to create a genuine issue of fact

concerning either continuing or independent acts of discrimination, which would forestall entry of summary judgment.

In view of the foregoing disposition of defendants' motion for summary judgment, it is not necessary to address the remaining bases advanced by the defendants in support of their motion for summary judgment.

An appropriate order granting the defendants' motion for summary judgment will follow.

Gustave Diamond
United States District Judge

Dated: June 29, 1984

cc: Stanley M. Stein, Esq.
Feldstein, Grinberg, Stein & McKee
428 Boulevard of the Allies
Pittsburgh, Pa. 15219

James J. Restivo, Jr., Esq.
Martha H. Munsch, Esq.
Michael J. Betts, Esq.
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Pittsburgh, Pa. 15219

IN THE
United States District Court
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

HELEN HELLMAN, Plaintiff, v. JEROME ROSENBERG and THE UNIVERSITY OF PITTSBURGH, Defendants.	Civil Action No. 83-2678

MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT

Defendants, the University of Pittsburgh (the "University") and Jerome L. Rosenberg, by their undersigned attorneys and pursuant to Rule 56 of the Federal Rules of Civil Procedure, hereby move this Court to enter summary judgment in their favor, and in support hereof state as follows:

1. This is an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, *et seq.*, wherein plaintiff alleges that in 1972 she was denied tenure at the University because of her sex.

2. There are no genuine issues of material fact as to the issues raised in this Motion. The undisputed facts upon which defendants rely are taken from the pleadings, the deposition testimony of plaintiff, and the affidavits of Dean Jerome Rosenberg and Michael J. Betts.

3. Under the undisputed facts, defendants are entitled to judgment as a matter of law for any one of the following reasons:

a. At the time of the alleged discriminatory conduct of which plaintiff complains, defendants were not subject to Title VII; the Complaint therefore fails to state a claim under Title VII upon which relief can be granted;

b. Plaintiff's EEOC charge was filed 431 days after the alleged discriminatory conduct of defendant's since plaintiff failed to file her charge with the EEOC within the 300-day limitations period of Section 706(e) of Title VII, 42 U.S.C. §2000e-5(e), her claim is barred; and

c. Plaintiff's action is barred by the doctrine of laches because the institution of this lawsuit over *eleven and one-half years* after the alleged discriminatory conduct of defendants constituted an inexcusable delay and has prejudiced defendants' ability to defend.

WHEREFORE, for the foregoing reasons and those set forth in the accompanying Brief, which is incorporated herein by reference, defendants respectfully request that this Motion be granted and that summary judgment be entered in their favor as to the entire action.

Respectfully submitted,

JAMES J. RESTIVO, JR.
MARTHA H. MUNSCH
MICHAEL J. BETTS
REED SMITH SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania 15219

RONALD F. TALARICO
UNIVERSITY OF PITTSBURGH
3209 Cathedral of Learning
Pittsburgh, Pennsylvania 15260

By .....
Counsel for Defendants

February 20, 1973

In reply refer to:
Case No. TPI3-0511
HELLMAN VS. UNIVERSITY
OF PITTSBURGH

Mr. John Gabriel, Chief of Compliance
City of Pittsburgh
Commission on Human Relations
908 City County Building
Pittsburgh, PA 15219

Dear Mr. Gabriel:

The enclosed communication has been submitted to us alleging a violation of Title VII of the Civil Rights Act of 1964, as amended.

Pursuant to Section 706(b) of the Act, no charge may be filed with this Commission under Section 706(a) until the expiration of 60 days after proceedings have been commenced under your Fair Employment Practice law, unless such proceedings are terminated earlier.

Since we are currently investigating charges concerning this respondent, however, we request an early termination of your proceedings so that we may expedite the case.

Your continued cooperation is appreciated.

Yours truly,

A. KEITH MCDONALD
Acting District Director

Enclosure

EXHIBIT A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PITTSBURGH DISTRICT OFFICE
1000 LIBERTY AVENUE
ROOM 2038
PITTSBURGH, PENNSYLVANIA 15222

June 25, 1973

In reply refer to:
Case No. TPI3-0511

Helen Hellman
125 S. Fairmont Street
Pittsburgh, PA 15206

Dear Dr. Hellman

This is in reference to our letter advising you that under Title VII of the Civil Rights Act of 1964, as amended, we were obliged to defer your charge to a State or local agency for a period of 60 days to investigate and make determination concerning your complaint.

The 60 days have elapsed. Therefore, unless we hear from you to the contrary we shall assume that you wish this Commission to process your charge.

We have many cases on file, however, and it may be some time before an investigator from our staff is able to contact you to commence the investigation.

Your patience and cooperation will be appreciated.

Yours truly,

Eugene V. Nelson
District Director

EXHIBIT B

UNIVERSITY OF PITTSBURGH
PITTSBURGH, PENNSYLVANIA 15213

RHOTEN A. SMITH, PROVOST

MEMORANDUM

TO: Miss Karen Farber, ACWO
FROM: Rhoten A. Smith, Provost
DATE: March 29, 1972
SUBJECT: Your memorandum of February 16 re: Dr. Helen Hellman

Since receiving the memorandum noted above, I have tried to sort out my thoughts, not only with regard to the particular case concerned, but with reference to the important general issues raised by this and similar cases. I should like in this memorandum to set forth some of my personal views on procedures for the awarding of tenure in the hope that it might provide the basis for a fruitful dialogue with you and other members of ACWO.

After you have considered this, I hope you might be willing to come in with other members of ACWO interested particularly in these issues and join me in a full discussion of tenure and non-renewal of contracts. I know I should be grateful for the opportunity to exchange views on a subject of great importance to us all.

Let me make three observations with regard to the points raised in your memorandum of February 16:

(1) The right of administrative review of recommendations for tenure is a very important part of a total process whereby the University makes a most important commitment to a member of the faculty. The recommendation is considered

first at the departmental level, and very properly so, for this is where the primary responsibility for establishing professional standards must lie. A negative decision at this point may be reviewed by the Dean and the Provost, but an overturning of a negative departmental decision should not, in my opinion, be disturbed, unless of course violations of an individual's academic freedom or civil rights are alleged. This is because a department ought to be free to set professional standards as high as it possibly can effectively; for an administrator to reverse a negative decision (unless there were evidence that it was based upon impermissible grounds) would be to impose lower standards upon a department than those it wished to establish.

EXHIBIT 4

Review of a positive recommendation for tenure, including denial of the recommendation, is, however, an entirely different matter, I think. There are, in addition to departmental standards of professional excellence, college and university standards. A given department may be high or low on this scale by college standards; a given school may be high or low by university standards. Thus, review of tenure recommendations by the Dean is an important prerogative by means of which minimum standards of quality may be maintained throughout the school. To deny the Dean this right would render him or her powerless to improve the quality of any department or to challenge a mediocre department to set its sights higher. Similarly, review of recommendations by the Provost and Chancellor are necessary for the protection of university standards.

Furthermore, there are often reasons for having doubts about granting tenure of which a department might not be fully aware. These include budgetary considerations, both short- and long-range; decisions about college or university mission which might affect the ultimate size of a department; an overcrowding of tenured ranks; program emphases mandated by the state; and others. Again, the separate approvals of the granting of tenure to a faculty member by the Dean, the Provost, and the Chancellor, while they may usually be given as a matter of course are not automatic and cannot be relinquished. Thus, a departmental recommendation for tenure is a necessary, but not sufficient, condition for its granting.

(2) In part, the ACWO memorandum seeks to make the point that, *in your committee's judgment,* Dr. Hellman deserves tenure on her professional qualifications. This judgment, in this case, happens to coincide with that of the department, but is at variance with Dean Rosenberg's judgment

and with the unanimous judgment of the *ad hoc* committee which he formed to advise him. While members of ACWO are entitled to this substantive judgment, I hope you might agree with me, and, incidentally, with the American Association of University Professors, that no committee whose concern is civil rights (which, I take it, is your concern) or academic freedom (such as that of the Senate Committee on Tenure and Academic Freedom) should attempt to make such substantive judgments about professional qualifications. It is well settled, I think, that the maintenance of suitable professional standards, the protection of the fiscal viability of the University, and the execution of academic planning all require that substantive evaluation of a faculty member for tenure be made by his or her department, the Dean, and the relevant University administrators.

(3) Finally, I note that your memorandum states that the decision in Dr. Hellman's case is in opposition to the commitment made to affirmative action by the Chancellor and me, and you ask that the decision be reversed in accordance with our stated affirmative action goals.

The Chancellor and I are indeed seriously committed to the Affirmative Action Program. And if there were the slightest scintilla of evidence that Dean Rosenberg or his advisory committee acted on the basis of a bias against women, ACWO would certainly rightfully protest the action, and the administration could be expected to set the matter to rights. There is, in fact, however, no such evidence in this case, and I don't believe your committee alleges such bias. In any event, I have every reason to know Dean Rosenberg to be as fully committed to the Affirmative Action Program as the Chancellor or I.

Beyond this, I am concerned with your suggestion that not granting tenure to women is in direct opposition to the Affirmative Action Program. My position is firmly that tenure decisions about women and minority group members ought to be made on exactly the same basis as that of others: professional competence, concordance of the field of the candidate with academic priorities, and future budgetary implications of promotion to tenure.

I am told that about fifty percent of those faculty accorded an initial appointment at Pitt are eventually awarded tenure; the other half either leave the University of their own accord or have their contracts not renewed for reasons such as those listed above. If everyone is judged on the same objective criteria, then one would suppose that about the same proportion of women and minority group members as of others would eventually earn tenure.

To use lower standards for promotion to tenure for women and minority group members as a means of meeting Affirmative Action goals would to my mind be a grave mistake. This would quickly come to be widely known and would seem to me to further degrade the status of women and minority group members. We have insisted that women, given a chance, can perform on a basis of full equality with men. I believe that myself, and I should therefore be very loath to adopt a policy which held that women should be accorded tenure *because* they are women. I don't think you mean to be suggesting such a policy, but the language of your memorandum comes close to this.

I have gone to some pains to set forth my thoughts on this subject, partly in response to your memorandum on the case of Dr. Hellman, but partly also as a basis of discussion of my views on the general subject of women's opportunities and

other general aspects of this case. I apologize for the length of my response, but I hope it might provide a framework for fruitful discourse between this office and ACWO. I look forward to discussing this with you.

cc: Dr. Edward J. Blakely
Dr. Donald M. Henderson
Dr. Barbara W. Newell
Chancellor Wesley W. Posvar
Dean Jerome L. Rosenberg

FACULTY OF ARTS AND SCIENCES
UNIVERSITY OF PITTSBURGH
PITTSBURGH, PENNSYLVANIA 15213

March 28, 1972

OFFICE OF THE DEAN

Professor Helen Hellman
125 South Fairmount Street
Pittsburgh, Pennsylvania 15206

Dear Helen:

On February 14, 1972 we discussed a decision that I had made the previous week to inform you that the University would not renew your appointment beyond the 1972-73 academic year. In response to your request and in view of additional information which you made available to me and which would come to my attention from other sources within the coming weeks I informed you on February 29 that I was indeed reviewing the matter. After a very careful study of all the information available I have regretfully come to the conclusion that the earlier decision must stand, and I am in this letter providing formal notification that the University will not extend your appointment beyond the present two-year contract due to expire at the end of the 1972-73 academic year.

It is unfortunate that under the current enrollment and budgetary constraints faced by the entire institution we are not free to retain all persons who have made valuable and conscientious contributions to our academic life. I recognize the significance of the work you have done as a member of our faculty during the past two years and I would be willing to do

anything I can to assist you in locating a satisfying continuing professional appointment which you deserve.

Sincerely yours,

Jerome L. Rosenberg
Dean

JLR:db
Copy
Philip Koch

Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. TPI3-0511

(PLEASE PRINT OR TYPE)

1 Your Name (Mr., Mrs., Miss) (Indicate) Dr. Helen Hellman Phone Number 363-5439

Street Address 125 South Fairmont Street

City Pittsburgh State PA Zip Code 15206

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)

Race or Color ☐ Religious Creed ☐ National Origin ☐ Sex ☒ Female

3 Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Name University of Pittsburgh College of Arts and Sciences

Street address Fifth and Bigelow Avenues

City Pittsburgh State PA Zip Code 15213

AND (other parties if any)

4 Have you filed this charge with a state or local government agency? Yes ☐ When ____ (MONTH) ____ (DAY) ____ (YEAR) No ☒

5 If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☒

6 The most recent date on which this discrimination took place: Month 1 Day 26 Year 73

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

I feel that my failure to be granted tenure by the above named respondent institution is indicative of a continuing pattern of practice of sex discrimination against me and similarly situated women in violation of Title VII of the Civil Rights Act of 1964, as amended.

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date January 26, 1973 Helen Hellman (Sign your name)

Subscribed and sworn to before me this 26th day of January 1973

(Name) Equal Employment Officer (Title)

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will arrange to get the form sworn to.

FORM APP., BUR. OF BUDGET—No. 124-R0001

FORM EEOC-5 (Rev. 7-

BEST AVAILABLE COPY

recommendations which accepted the tenure for the faculty member and those which rejected it?

A. I am not sure what your question implies?

MS. MUNSCH: I am not sure, either.

Would you clarify the question for us?

BY MR. STEIN:

Q. Okay. Do you recall that the delegation of authority specifically dealt with the fact that when you accepted the recommendation of the Faculty Committee, the Tenure Committee, that acceptance had to be acted on by the Provost and, ultimately, the Chancellor; but that if you rejected it, that that rejection did not have to be acted on?

A. I am aware that that is, indeed, the practice and the policy.

Q. And that is the practice that had always been—

A. Yes.

Q. —enforced, during all the time you recall being the Dean?

A. Yes.

MS. MUNSCH: Just so I am sure I understand.

The question and answer is: When you accept a recommendation that a faculty member be tenured, that decision must be acted on by the Provost, and the Chancellor; but when Dr. Rosenberg makes a decision to deny tenure to a faculty member, that denial does not have to be ratified by the Provost, or the Chancellor?

MR. STEIN: That is what I understand his testimony to be.

THE WITNESS: That is correct. Now, there has been a provision, in the university bylaws, that allows a faculty member who has been denied tenure and title, to ask the Chancellor to establish a hearing board to hear an appeal.

That has been part of our bylaws since before 1972.

It is advertised; it is well-known to faculty. It is not often used but

FACULTY OF ARTS AND SCIENCES
UNIVERSITY OF PITTSBURGH
PITTSBURGH, PENNSYLVANIA 15213

DEPARTMENT OF FRENCH AND ITALIAN LANGUAGES AND LITERATURES
OFFICE OF THE CHAIRMAN

December 14, 1971

Dean Jerome Rosenberg
Faculty of Arts & Sciences
1001 Cathedral of Learning

Dean Dean Rosenberg:

On Monday, December 13, eight tenured faculty members met to consider the future of Mrs. Helen Hellman in this Department. (The ninth and final tenured faculty member, Associate Professor Jerome Schwartz, is out of the country and will be contacted by letter.) By vote of seven in favor and one abstention the faculty recommended promotion and tenure for Mrs. Hellman. As soon as it is available, Professor Schwartz's vote will be communicated to you as well.

Sincerely yours,
Philip Koch
Chairman

We, the tenured faculty present at the meeting of December 13, have read the preceding statement and guarantee its accuracy.

Benjamin F. Bart
Professor

Joseph V. Greco
Associate Professor

Benjamin W. Haseltine
Professor

Robert E. Mitchell
Associate Professor

Walter Albert
Associate Professor

Douglas Radcliff-Umstead
Associate Professor

Barbara N. Sargent
Professor

FACULTY OF ARTS AND SCIENCES
UNIVERSITY OF PITTSBURGH
PITTSBURGH, PENNSYLVANIA 15213

DEPARTMENT OF FRENCH AND ITALIAN LANGUAGES AND LITERATURES
OFFICE OF THE CHAIRMAN

December 15, 1971

Dean Jerome Rosenberg
Faculty of Arts & Sciences
1001 Cathedral of Learning

Dean Dean Rosenberg:

On Monday, December 13, eight tenured faculty members met to consider the future of Mr. Benjamin Hicks in this Department. (The ninth and final tenured faculty member, Associate Professor Jerome Schwartz, is out of the country and will be contacted by letter.) By vote of five in favor and three opposed the faculty recommended promotion and tenure for Mr. Hicks. As soon as it is available, Professor Schwartz's vote will be communicated to you as well.

Sincerely yours,
Philip Koch
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We, the tenured faculty present at the meeting of December 13, have read the preceding statement and guarantee its accuracy.

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Robert E. Mitchell
Associate Professor

Douglas Radcliff-Umstead
Associate Professor

FACULTY OF ARTS AND SCIENCES
UNIVERSITY OF PITTSBURGH
PITTSBURGH, PENNSYLVANIA 15213

February 21, 1972

DEPARTMENT OF FRENCH AND ITALIAN LANGUAGES AND LITERATURE

Dean Jerome L. Rosenberg
Office of the Dean

Dear Jerry:

I have the feeling from our talk last week that your files with reference to my general situation, my background and work here are not quite complete, and I am therefore sending you precise information, with the hope, of course, that you will favorably review my situation.

In connection with your reservations about publication of my book, I feel it is unfair to be judged without complete knowledge of the circumstances of the delay. As I told you, I submitted by finished manuscript in the Spring of 1971, with the hope of editorial comment so I could make necessary revisions during the summer. After no word all summer, I finally was able to see the editor in New York in October, who explained to me his idea for the book, which did not accord with the form I had originally submitted to Professor Clements and which I naturally assumed was to be adopted. The new editor wanted a book more popular in style, less serious and scholarly. In the meantime, I also discovered that Professor Clements had misplaced my manuscript, which was why I had gotten a peculiar run-around at the time of my inquiries during the summer and finally sent it to me in November. So you can imagine what my feelings were when I discovered that Professor Clements, whose original recom-

mendation of my thesis I am sending for your information, wrote in a letter of recommendation that I was "slow." I consider this professional carelessness and a betrayal on his part. And I obviously feel victimized by it.

With regard to the figures cited about my classes, I would like to recall to you that in the fall of this past academic year, I had two classes of 28 and 21 respectively, and a smaller class as well. This semester I have a graduate seminar on Proust of 14, which is quite large for a monographic course of this type. I consider that the preparation and research into Proust's monumental work constitutes very serious scholarship, and I have critical ideas for exploration if I ever should find the time. I am enclosing for your information sample copies of the student evaluations for the twentieth century survey I taught in the fall, dealing for the first time with various new works; this is one of the problems faced in contemporary material. I found the evaluations moving and instructive, possibly indicating means to pedagogic perfection.

I would also like to draw your attention to my contributions to the development of the comparative literature program, specifically, at this point, cooperation in the design and formulation of the aims of the program in its new brochure; and a projected team-taught course next fall in contemporary theater with colleagues in Italian and Spanish. I have also had a meeting with Professor Curtis Porter with a view to cooperation in a course of Black Literature of French Expression, a subject which has been introducted at several major universities, like the University of Wisconsin, and the University of Texas, where a review of the subject is published. My name has also been submitted to the Women's Studies Program, as I am available to teach in it by virtue of my experience, interest, competence and point of view.

I believe you have a copy of my activities over the past year, including the past semester. I can assure you that they have been totally time-consuming and continue to be so. In addition, I have recently consented to serve on the dissertation committee of a student outside the department.

I believe that my activities here show that I have been a useful teacher and serious scholar and have served the University faithfully and with zeal. Please note that this is only my second year.

Sincerely yours,
Helen Hellman

FACULTY OF ARTS AND SCIENCES
UNIVERSITY OF PITTSBURGH
PITTSBURGH, PENNSYLVANIA 15213

March 28, 1972

OFFICE OF THE DEAN

Professor Helen Hellman
125 South Fairmount Street
Pittsburgh, Pennsylvania 15206

Dear Helen:

On February 14, 1972 we discussed a decision that I had made the previous week to inform you that the University would not renew your appointment beyond the 1972-73 academic year. In response to your request and in view of additional information which you made available to me and which would come to my attention from other sources within the coming weeks I informed you on February 29 that I was indeed reviewing the matter. After a very careful study of all the information available I have regretfully come to the conclusion that the earlier decision must stand, and I am in this letter providing formal notification that the University will not extend your appointment beyond the present two-year contract due to expire at the end of the 1972-73 academic year.

It is unfortunate that under the current enrollment and budgetary constraints faced by the entire institution we are not free to retain all persons who have made valuable and conscientious contributions to our academic life. I recognize the

significance of the work you have done as a member of our faculty during the past two years and I would be willing to do anything I can to assist you in locating a satisfying continuing professional apointment which you deserve.

Sincerely yours,
Jerome L. Rosenberg
Dean

JLR:db
Copy
Philip Koch

March 28, 1972

Dr. Rhoten A. Smith
Provost
132 Cathedral of Learning

Dean Rhoten:

I am recommending the promotion of DR. BENJAMIN HICKS to the rank of ASSOCIATE PROFESSOR IN THE DEPARTMENT OF FRENCH AND ITALIAN LANGUAGES AND LITERATURES, with TENURE effective September 1, 1973.

Dr. Hicks received his Ph.D. at Indiana University in 1967 and joined our staff in the fall of that year. He had previously taught for three years at Ohio Wesleyan as Instructor. At Pitt he is currently the only member of the faculty who specializes in 17th century French literature. Over the course of the past five years he has taught intermediate French composition and conversation, the undergraduate course in 17th century, the graduate survey course sequence in 17th century and specialized graduate seminars in Moliere and Racine. In the fall of 1971 he took on a new assignment as coordinator of the French elementary language instruction in which he has served extremely effectively.

The recommendation for promotion was a divided one at the level of the tenured members of the Department, coming with a vote of 6 to 3. The negative votes all came from strong scholars within the Department who felt the Department could do better by bringing in a replacement who would have some more vigorous dedication to scholarly work. With the concurrence of my advisery group on promotions I decided in the first week of February not to recommend promotion. After communicating this decision to Professor Koch orally, I was

asked to reopen the question and I have done so. Several things have developed in the ensuing seven weeks. Professor Koch has made, in the form of two enclosed new letters, a very strong appeal on the basis that the success of the coordination of the elementary language program this year has brought language instruction in the Department of French out of a state of anarchy into which it had fallen for the lack of effective direction. Professor Hicks meets bi-weekly with all Teaching Assistants who are engaged in the elementary instructional program, and he has visited in each of the terms of this year a class of each Teaching Assistant. He has taken on the responsibility for curriculum outline, course scheduling, training of Teaching Assistants, and book selection. He has been described to me by the part-time lecturer, Mrs. Gabrielle Harvey who has helped hold together the language program for six years, as by far the most effective faculty coordinator she has known in the Department. A delegation of Teaching Assistants and graduate students has come to me and made a very impressive case that Dr. Hicks has restored not only order to the undergraduate program but good morale to the lives of the graduate students in the Department. Although he has not published, he has apparently managed in his graduate courses, to bring to his students a real love for scholarship and an up-to-date review of the status of the field.

Another new development that has occurred in the past seven weeks was the untimely death of Professor Robert Mitchell, The Department is planning to postpone the hiring of another 18th century scholar, Professor Mitchell's description, until another vacancy should occur by termination or resignation, even if that may take three years. Prior to Professor Mitchell's death, I had felt that we should terminate two of our present non-tenured staff in French in order to provide a line for the in-coming Chairman, Professor St. Aubyn and to

allow a drop in faculty size in recognition of the declining enrollments in the Department. Dean Schneewind has persuaded me that if there is ever to be a case of a person who will receive his promotion primarily on the basis of teaching effectiveness, we are not likely to find a stronger case than Dr. Hicks. I made the regretful decision not to accept the departmental recommendation, also a split one but not split as in the case of Hicks, to grant tenure to Professor Helen Hellman. Professor Hellman works in 20th century literature, especially theatre. This area does overlap that of our new chairman, and I cannot justify her continuation on the basis of a unique role that she could play in the Department.

I am asking for your concurrence in this recommendation.

Cordially yours,
Jerome L. Rosenberg
Dean

JLR:db
Enclosures

UNIVERSITY OF PITTSBURGH
PITTSBURGH, PENNSYLVANIA 15213

RHOTEN A. SMITH, *Provost*

April 26, 1972

Dean Jerome L. Rosenberg
Faculty of Arts and Sciences
1001 Cathedral of Learning

Dear Dean Rosenberg:

After the most careful consideration I must inform you that I cannot support the recommendation for promotion and tenure for Dr. Benjamin Hicks of the Department of French and Italian Languages and Literatures. As I am sure you appreciate, this has not been an easy decision, but the marginal character of the case is itself an argument for caution in so important a matter as tenure, especially in a department where enrollments suggest some shrinkage in staff. He should, therefore, be on terminal appointment for 1972-73.

The most compelling argument on Dr. Hicks' behalf is the assertion that he is a very effective teacher at the graduate and undergraduate level. Cited is his rating in one course in the current Undergraduate Review: a number of letters from his students, mostly graduates; and favorable comments on his teaching from Dr. Koch and one or two other colleagues. The latter is conterbalanced by contrary statements on his teaching from three other colleagues.

While I am eager to reward true excellence in teaching, I am not persuaded by the evidence that we are unlikely ever to find a stronger case for tenure on the basis of teaching excellence than this. To me, it appears that he is good in this area but hardly outstanding. These are difficult matters to judge on

the record, but as far as one can tell a truly strong case has not been made.

I am also impressed with the record he has apparently achieved in his position as coordinator of the elementary language program. This is an important intra-departmental administrative task which the record seems to indicate he has handled very well. Dr. Koch has strongly urged that tenure be granted on the basis of teaching and support activities. As I have noted, however, I think the case has not been made on the basis of teaching, and excellence in an administrative area—which in any case will probably not be a long-term activity for any single member of a faculty—cannot to my mind constitute sufficient grounds for tenure.

Dr. Hicks has not published, and no one rests the case for tenure on this ground. I personally view publication as public evidence of scholarly activity, particularly valuable because it is subject to peer professional evaluation. At the same time, I recognize that one can stay current in one's field through study which might not necessarily result in publication. There is some evidence of scholarly activity which contributes to Dr. Hicks' teaching in the record, but this is disputed by the three colleagues voting negatively, all of whom are strong scholars themselves. Once again, the case made is not clear enough for one to disregard the lack of publication.

I am not unmindful of the strong representations made by Dr. Koch, particularly in his letters to you dated February 8 and February 29, and I have weighed these carefully in my decision. As persuasive as the points he makes are, however, I regretfully cannot believe that they wholly outweigh the cogent and often conflicting testimony of Professors Bart, Sargent, and Radcliff-Umstead. In the end, the case appears to me a truly marginal one, and I cannot comfortably agree to approve.

In sum, while Dr. Hicks appears to have performed some services for the department acceptably, the overall record of performance just does not convince me of the kind of general strength we can and ought to expect before granting tenure. Tenure decisions are, as I know you appreciate, among the most important that we make, for the University of Pittsburgh tomorrow will have exactly the quality we insist upon today. For that reason, I believe we should be rigorous in these decisions and extend tenure only when the case is clear and compelling.

Sincerely,
Rhoten A. Smith

cc: Chancellor Wesley W. Posvar
Mr. Robert E. Dunkelman

April 28, 1972

Professor Benjamin Hicks
6365 Ebdy Street
Pittsburgh, Pa. 15217

Dear Ben:

On February 23, 1972 we discussed a decision that I had made earlier in the month concerning renewal of your appointment beyond the 1972-73 academic year. In response to your specific request and those of Professor Koch and of a number of colleagues and students I told you at that time that I would review the earlier decision. During the past two months I have given a good deal of study to many details with respect to your service to the University and have discussed the matter on a number of instances with Dean Schneewind and with Provost Smith. I must regretfully inform you that even after the detailed review the University does not intend to extend your appointment beyond the present term of your contract due to expire at the end of the 1972-73 academic year.

I am mindful of the many areas in which you have performed fine service to the University of Pittsburgh and I offer to be as much help as I can to assist you in locating a

satisfying professional appointment at another institution. Unfortunately, one of the facts of academic life is that we are not able to offer tenure to all junior faculty who have served conscientiously.

Sincerely yours,
Jerome L. Rosenberg
Dean

Carbon Copy
Philip Koch
Rhoten A. Smith

FACULTY OF ARTS AND SCIENCES
UNIVERSITY OF PITTSBURGH
PITTSBURGH, PENNSYLVANIA 15213
DEPARTMENT OF FRENCH AND ITALIAN LANGUAGES AND LITERATURES

May 17, 1972

Dr. Rhoten A. Smith, Provost
132 C.L.
University of Pittsburgh
Pittsburgh, Pa. 15213

Dear Provost Smith:

Thank you for granting me the opportunity on May 11 to discuss my tenure case with you. I must tell you that I came away from our meeting with no sense of satisfaction and regretting that you showed no indication of changing your position concerning my tenure. I am not consoled by the fact that my case may be reconsidered next year, my terminal year at the university.

The overwhelming sense of injustice that I feel compels me to pursue the case through every professional means at my disposal. I therefore request that you send me a written statement of your reasons for overruling the recommendation of Dean Rosenberg and his advisory committee that I be granted tenure. It is also my intention to seek a hearing before a review board to discuss the case.

I have long been aware of the AAUP guidelines for granting tenure. Since I was in the tenure stream during my three years as a faculty member at Ohio Wesleyan University (1964-1967) and have served on the faculty at Pitt for the past five years, I more than meet the minimum qualifications for

tenure. As far as AAUP is concerned I have already had *de facto* tenure for a year.

Thank you again for granting me an audience. I await your written statement at your earliest convenience.

Sincerely yours,
Benjamin E. Hicks
Assistant Professor of French

cc: Professor Seeburger

UNIVERSITY OF PITTSBURGH
PITTSBURGH, PENNSYLVANIA 15213
RHOTEN A. SMITH, *Provost*
CONFIDENTIAL

June 2, 1972

Dr. Walter Albert
Acting Chairman
Department of French and Italian
Lanugages and Literatures
642 LIS Building

Dear Dr. Albert:

I have today received your letter of May 31, 1972 requesting that I reconsider my decision in the case of Dr. Benjamin Hicks of your department. In view of the cogent and relevant points made in your letter, and in view of new evidence produced both in the written and oral mode by Mr. Antos, Mrs. Hollander and Mrs. Tuma, I have decided to open the case for reconsideration.

It will be my intention to invite written testimony and evidence from all knowledgeable sources. I will then review the case *de novo*, as it were, with the same single end in view as before, the good of the university. I will approach the task as seriously and professionally as before, but with, perhaps, a more complete and specific record before me. I can assure you that if convinced I will not hesitate to reverse myself, but if unconvinced neither will I hesitate to reconfirm the decision.

What we are looking for can be demonstrated, I think, even if perfect "proof" eludes us as in all things. Dr. Hicks' lack of a significant publication record is not in dispute. Nor is his record of high performance as coordinator of the elementary courses. His value to us then must turn on evidence of the

quality of his critical faculties, his scholarship and scholarly activities related to teaching, and above all, on his teaching performance in the broadest sense of the term: his impact on students and his ability to lead them to grow in understanding and appreciation of his subject.

I have never said that scholarly publication is a *sine qua non* of retention on tenure. But I think in its absence—for ordinarily it *is* significant—we *can* reasonably expect a scholarly and inquiring mind coupled with an unusual ability to work with students and nurture their intellectual growth. These qualities can be demonstrated, I believe, if not so easily as with published scholarship. But if we are to really encourage faculty to put effort and energy into effective teaching, we must be prepared to demonstrate the presence of these qualities convincingly, so that it can be rewarded as it should.

Please feel free to direct any further comments you may hve directly to me. I will be asking others to do likewise.

Sincerely,
Rhoten A. Smith

FROM RHOTEN A. SMITH
PROVOST
UNIVERSITY OF PITTSBURGH

Jerry: I meant to tell you on the phone today that I have decided to reconsider the Hicks case. The evidence I have been getting just leaves me uneasy; perhaps the decision was not a wise one. In any event I would rather appear wishy-washy than to do an injustice.

I may also use an ad hoc advisory committee.

I just wanted to be sure you knew.

Rhoten

Islesford, Maine 04646
July 6, 1972

Dean Jerome Rosenberg
Faculty of Arts and Sciences
University of Pittsburgh
Pittsburgh, Pennsylvania 15213

Dear Jerry:

This is in reference to my appeal for tenure review. I understand that the new Tenure and Review Board has been constituted, and this letter is a formal request that my case and all documents and files pertaining thereto be referred to this board.

If there is any other procedure, or actions necessary by me at this time, would you kindly advise me or refer me to the proper persons for such information.

Thank you for your attention.

Sincerely yours,
/s/ HELEN HELLMAN
Helen Hellman
Associate Professor of French

July 12, 1972

Professor Helen Hellman
Islesford, Maine 04646

Dear Professor Hellman:

We are just now trying to develop procedures for operation of the new Tenure and Promotions Board. Under the preliminary set of guidelines developed by FASC, as published in Vol. 3, #18 of the GAZETTE, a formal request for a Hearing Panel should be made only after the faculty member has requested and received a written statement of reasons for non-reappointment. On March 28, 1972 I wrote to you of my decision not to recommend reappointment after reconsidering my earlier decision of the preceding month. My letter to you did not contain what I would consider to be a statement of reasons for my decision. During the past year, partly as a result of faculty action at our full Faculty Meeting of April, we have been developing a policy of providing a written statement of reasons on request and only on request. The justification for withholding such a written statement is based partly on the interests of the faculty member, which may be perceived as being better served by keeping from the written record a detailed statement for a negative action, as discussed thoroughly in the A.A.U.P. Bulletin, Vol. 57, #2, page 208, June, 1971, from which the following passage is extracted.

> It may not always be to the advantage of the faculty member to be informed of the reasons, particularly in writing. If he is informed of them, he can be placed under an obligation to divulge them to the appointing body of another institution if it inquires why he is leaving his present position. Similarly, a written record is likely to become the basis for continuing responses by his former

institution to prospective appointing bodies and may thus jeopardize his chances for obtaining positions over an extended period.

It is not in any sense of threat that I am quoting the above statement but simply an explanation of the background for our general policy that applies in all cases. If you wish to proceed with the grievance procedure, your next action should be to request in writing that I give you a written statement of reasons for your non-renewal. If you make such a request and then are not satisfied with the reasons contained in my statement, then you may request that the appeal procedures be invoked. In that case my written statement to you would be part of the record given to the Hearing Panel.

In practice no time is being lost by this intervening step of the request for a written statement of reasons and my response thereto. Because of staggered summer vacations it would be very difficult for us to convene a Hearing Panel prior to the beginning of the fall term. Although we are developing groundrules that would specify maximum periods of time within which various steps leading to an appeal should be taken, I will recognize your letter of July 6 as bona fide statement of your intention to pursue the new procedures and you will be allowed a reasonable time to make the next moves available to you. The other principle of timeliness of appeals procedures to which I should refer is the recognition by FASC that if a faculty member has been notified of non-renewal within the proper period of time prior to the expiration of his

current, appeals procedures that may develop beyond that time will not be considered to have negated the timeliness of the notification should the appeal lead to no change in the decision by the University not to renew the appointment.

Very best wishes for a continued good summer.

Sincerely yours,
Jerome L. Rosenberg
Dean

JLR:db

FACULTY OF ARTS AND SCIENCES
UNIVERSITY OF PITTSBURGH
PITTSBURGH, PENNSYLVANIA 15213
DEPARTMENT OF FRENCH AND ITALIAN LANGUAGES AND LITERATURES
OFFICE OF THE CHAIRMAN

September 5, 1972

Dean Jerome L. Rosenberg
Faculty of Arts and Sciences
University of Pittsburgh
Pittsburgh, Pennsylvania 15213

Dear Dean Rosenberg:

This is in reply to your letter of July 12, 1972, informing me of procedures for operation of the new Tenure and Promotions Review Board.

Thank you for advising me of the statement in the AAUP Bulletin. I feel impelled by conscience, however, to request a written statement of reasons for non-appointment and am therefore confirming my request of July 6, 1972, with the intention of following the constituted procedures for appeal.

Sincerely yours,

/s/ HELEN HELLMAN

Helen Hellman
Associate Professor of French

September 22, 1972

Professor Helen Hellman
Department of French & Italian
Languages & Literatures
6th Floor
AIR Bldg.

Dear Helen:

I am writing in response to your letter of September 20, 1972. If you wish to invoke the intervention of the Tenure and Promotions Review Board, you should make such a request to me. The hearing panel would have to be selected by the two of us in accordance with the stated provisions. I therefore suggest that if you plan to appeal, you make an appointment to see me in my office in the very near future so that we may select the members of the hearing panel.

Sincerely yours,
Jerome L. Rosenberg
Dean

JLR:jm

UNIVERSITY OF PITTSBURGH
PITTSBURGH, PENNSYLVANIA 15213
RHOTEN A. SMITH, *Provost*

November 3, 1972

Dr. Benjamin E. Hicks
6365 Ebdy Street
Pittsburgh, Pennsylvania 15217

Dear Dr. Hicks:

First, let me apologize for the long delay in reporting to you the results of my reconsideration of tenure for you in the Department of French and Italian languages and Literature. For one thing, I wanted to give Dr. St. Aubyn, the new Chairman of the department, an opportunity to express his views, if any. Most importantly, however, I wanted to review the record most carefully myself and to seek expert advice with regard to the evidence presented in the case.

On the basis of this new review of your record, I am forwarding my recommendation to the Chancellor that you be promoted to the rank of Associate Professor with tenure, effective September 1, 1972. By copy of this letter, I am requesting that Dean Rosenberg re-submit his recommendation to me, which I will pass on to Chancellor Posvar with my own positive recommendation.

I am reversing my decision for one reason only: the evidence presented in response to my letter of June 6 to the members of the tenured faculty of your department, and in response to my request of graduate students who have been in your classes, persuades r e—and other disinterested advisors —that your teaching, both at the graduate and undergraduate level, is not only above average, but, in the judgment of many,

superior. The care with which most respondents prepared their replies to me has produced a record which not only presents qualitative judgments about your teaching ability, but which details, often meticulously, the way you approach your classes; the sensitive concern you have for students and their problems (I have often said that the *first* requisite of a good teacher is that he or she like young people); the care which goes into your grading of papers; the response of your students to you, both in and out of class; and, perhaps most telling, the attestations of students concerning their own intellectual growth under your tutelage.

I have felt personally throughout my professional career that superior teaching can be recognized by one's colleagues, that evidence for it can be adduced, and that we must make the effort if we are to encourage young faculty members to care about the quality of their teaching effort. In your case, the evidence was not brought forward when the recommendation came to me; but the file I have now is a good example of what we should have in all considerations for tenure.

I deeply regret the personal anguish to which you and your family have been subjected by this process of consideration, which by now has taken virtually a year. I hope you know that all along I have been directed, as I now am, only by my responsibility to the University as it honestly appears to me. I now have considerable confidence that the decision as finally made is the right one and one that will redound to the long-run interests of the University and our students.

One inevitable result my study of your case is that I think I know a good deal about you, your position in the department, and the kind of contributions to the department you have made. I have also come to some conclusions which you might find of interest and which might be of some use as you think about your career in the years ahead. I would be most pleased, therefore, if we could find a mutually convenient time to meet again personally in my office. If you agree, please give my secretary a call.

With all good wishes.

Sincerely,
RAS
Rhoten A. Smith

RAS/ei

cc: Dean Jerome L. Rosenberg
Dr. Frederic C. St. Aubyn

December 29, 1972

Professor Benjamin E. Hicks
6365 Ebdy Street
Pittsburgh, Pennsylvania 15217

Dear Professor Hicks:

It gives me great pleasure to approve the recommendation of Dean Rosenberg and Provost Smith that you be promoted to the rank of Associate Professor of French and Italian Languages and Literatures in the Faculty of Arts and Sciences, with tenure. This appointment will be effective September 1, 1972. Please indicate your acceptance on the enclosed duplicate copy and return it to me within 15 days.

The award of tenure is one of the most highly prized attainments in the academic world and is given in recognition of distinguished achievement in scholarship and teaching. It reflects that you have made significant contributions both to your field and to the University.

I am very happy to endorse the recommendation of your colleages and to extend to you my warmest congratulations.

Sincerely,
Wesley W. Posvar
Chancellor

Enclosure

FACULTY OF ARTS AND SCIENCES
UNIVERSITY OF PITTSBURGH
PITTSBURGH, PENNSYLVANIA 15213
DEPARTMENT OF POLITICAL SCIENCE

February 6, 1973

Dean Jerome L. Rosenberg
Faculty of Arts and Sciences
1001 Cathedral of Learning

Dear Dean Rosenberg:

We herewith respectfully submit our findings and recommendations in the case of Professor Helen Hellman. This Committee took testimony from Professor Hellman, from you, and from Professors Sargent, Albert, Landy, and St. Aubyn. It also examined in some detail Professor Hellman's writings, letters from students, and the dossier you provided us. On the basis of this evidence and after a considerable amount of discussion, the Committee was able to reach agreement on some aspects of this case, but disagreed on others. Consequently, this report is in three parts: (1) general observations endorsed by all members; (2) a majority finding and recommendation, endorsed by Professors Beverly, Bramhill, and Coleman; and (3) a minority recommendation by Professors Gray and Schulman.

General Observations

This case had a number of dismaying features. The principal difficulty was the lack of clarity in the evidence and the impossibility of determining clearly what the essential facts were. The tenured faculty of Professor Hellman's department had twice voted with virtual unanimity to recommend tenure

for Professor Hellman, yet there appear to be at least two members of the department who were actually opposed to that recommendation even as they voted for it (or in one case abstained). More recently a vote was taken on—so far as we can determine—whether or not to uphold your decision to deny tenure; the vote this time was 5-3 against tenure. Subsequently Professor Wlassics has written to say that had he been consulted he would have supported a tenure recommendation; we have some reason to believe that Professor Koch would have acted similarly; and at least one member of the department expressed some second thoughts about the way he had voted (against tenure). The only conclusion we have been able to draw is that these recorded votes are not a reliable guide to the sentiment of the department.

There are, moreover, a number of incidental aspects to this case whose importance has been impossible for us to assess. It is clear that there are personal, factional, and ideological differences in the department. It appears reasonably certain that these conflicts affected the department's ability to make a disinterested judgment on the merits—i.e., on Professor Hellman's competence as teacher and scholar. Another factor was the awarding of tenure to Professor Hicks; we were unable to determine if the Hicks case affected the outcome of the Hellman case. The role of the new chairman, Professor St. Aubyn, is also somewhat ambiguous, and apparently related to the conflicts mentioned above.

Professor St. Aubyn said, for example, that he had never read anything written by Professor Hellman; nor could he provide a persuasive explanation for calling for a third vote. On the positive side we did hear and examine considerable evidence that Professor Hellman was a reputable scholar, that she was an effective teacher with wide-ranging interests, that she was especially good at establishing rapport with students.

Although one reason given (by you) for denial of tenure was that Professor Hellman "would be a luxury that we just cannot afford," it does appear that Professor Hellman's classes are of better than average size. We did not, however, investigate the economics of granting tenure to Professor Hellman in the context of the total cost-benefit situation of the department.

We all, therefore, regret the manner in which this case has been handled, and feel that some of the procedures employed did justice neither to the University nor to Professor Hellman.

John Beverley
David Bramhall
Emily Coleman
Peter Gray
Irwin Schulman (chairman)
/s/ IRWIN SCHULMAN

Hellman: Tenure and Promotion Review

Report of the majority:

It is our conclusion that Dr. Hellman should be granted tenure in the French Department by the University, as was recommended twice by her colleagues.

It is clear that the central question in the case is whether Dr. Hellman should be recommended for tenure *given* the anticipated budgetary cuts in foreign languages and the consequent reduced number of tenured slots available. That is, one has to weigh Dr. Hellman's eligibility for tenure in the *abstract* (e.g. as meeting the requirements outlined in the Faculty Handbook or the Provost's guidelines) against the *concrete* ongoing requirements of her department. This consideration is behind the implementing language of Dean Rosenberg's letter explaining his decision not to recommend tenure. Our review of the case and the evidence, on the other hand, leads us to the conclusion that Dr. Hellman is entitled to tenure in both respects. In particular, we would like to single out four main areas of inquiry which support our decision: 1. scholarship, 2. pedagogic value to her department and the university at large, 3. the question of departmental support, 4. affirmative action.

1. Scholarship

From the start it has been evident that the fate of Dr. Hellman's manuscript on the playwright Ghelderode has been decisive in evaluating her case. Testimony by Dean Rosenberg seemed to indicate that had the manuscript appeared in book form and been received with appropriate scholarly interest and criticism, the reservations about tenure would have been withdrawn. Dr. Hellman initially submitted the manuscript to N.Y.U. Press. It was greeted there with apparent enthusiasm (see below) but also with the condition that she revise and

expand. While she was engaged in this work, the Press underwent an editorial reorganization with the attendant delays in processing manuscripts and she saw herself obliged to withdraw it. Dr. Hellman subsequently submitted the manuscript to the University of Pittsburgh Press where it is under consideration at this writing.

The issue, as we see it, is not whether the manuscript has been or is about to be *published* but rather whether the manuscript is *publishable* and, more, would be an important contribution to French studies in the judgment of scholars of the field (v. "publishable manuscript" as a criteria for tenure in, e.g., the History Dept.). Problems and administrative vagaries of university presses cannot constitute a judgment on intellectual quality. Nor can we really set any objective standard for evaluating the speed or haste with which manuscripts should be revised. What is clear is that Dr. Hellman did go ahead with the revision and was simply unlucky. Our conclusion on quality follows from this. (We should note that one of us spent some time studying the manuscript in its present state.) Robert Clements, a reader for N.Y.U. Press, speaks of Dr. Hellman writing extremely well and of the importance of her topic (letter of Fall, 1968). He urges the "inevitable step" of revision for publication, comparing her thesis to those of Barrenecha (on Borges) and Ostrovsky (on Celine). Both of these last did appear as books and were greeted in their respective fields with acclaim and interest (*N.Y. Review of Books* reviews, etc.), so it is not without significance that Clements places Dr. Hellman's work in the same category. A letter from the N.Y.U. general editor (Hammond, 29, March, 1968) notes: "although . . . Prof. Clements doesn't think the manuscript is publishable in its present form, he is very much impressed with Miss Hellman's work and thinks she can easily revise and expand the manuscript to make it *the best critique of Ghelderode*

available anywhere." (italics ours) Another scholar (anon., Nov. 12, 1970) speaks of "a very important contribution to the literature on the modern French theatre. Another of "an outstanding and significant work of literary criticism." (Stigall, Nov. 12, 1970). Another of "not only solid but creative scholarship" (anon., Nov. 12, 1970). We were a bit in the dark as to what "the best critique of Ghelderode" might signify; we have since learned that Ghelderode is one of the seminal figures in modern European theater. So Dr. Hellman's work seems to have the additional virtue of pioneering critical scholarship on this figure in America.

In addition, we have the mute testimony of the many articles Dr. Hellman has published out of or around her thesis (in, *inter alias, The French Review* which we take to be the *PMLA* of, the discipline, the extremely prestigious *Revue de Littérature Comparée* edited by the distinguished scholar, M. Bataillon, the Dada and Surrealism Seminar of the 1972 MLA). Two negative opinions on her work were registered with Dean Rosenberg by anonymous colleagues in her department: e.g. finding it "sloppy", "disjointed." We resorted here to the admittedly crude artifice of comparing Dr. Hellman's publications to a sample we had of the work of a tenured and highly respected member of the department. Our competence is admittedly restricted here, but it seemed to us that Dr. Hellman's work held up here very well indeed in terms of quality of writing, scholarly rigor and importance. The committee as a whole agreed that she writes extremely well. We note also that she has recently been invited to prepare the 20th century drama section of a *Critical Bibliography of French Literature* in the works at Syracuse University Press.

We cannot help but conclude that Dr. Hellman's work is regarded as important *in and by* her field and that it is only a *mechanical* problem which has stalled publication of her the-

sis. (Which is now in the state of revision suggested by Clements). Moreover, this is *new* work in an extremely rich and crucial area of modern French literature.

2. Pedagogic Value

Dean Rosenberg writes in his *statement of reasons* that, given the expertise of the new French chairman in the modern period, to keep Dr. Hellman as a "third" 20th century specialist "would be a luxury that we just cannot afford." Further: "Although your teaching has been evaluated *as at least average* (our italics) I have not been persuaded of an essential unique contribution which our program absolutely requires." We have come to disagree with this implementing language on two grounds. First, Dean Rosenberg's remarks about the "luxury" of keeping a *third* modernist apparently depend on a department structured into literary "periods" with an allotment of two tenured faculty to each period. If this were indeed the case in the French Department there might be some point here. However, we have learned in testimony that the department has been re-structured since Dr. St. Aubyn's arrival along different lines (emphasis on field and general pedagogics) thus cancelling the stricture of proportional allotment. In any case, it is evident that in all foreign languages, student interest traditionally tends to concentrate in the modern period (both in graduate and undergraduate work) so that an overbalance there seems not so much "luxury" as pragmatic necessity.

Still, there is the question of quality and "unique" contribution. Dean Rosenberg speaks of "at least average" teaching. We have gotten a very different impression: to wit, that Dr. Hellman's teaching ability is considerably *above average*, that she displays considerable verve and originality, that she has attracted a considerable following among the students. We have been especially struck by the fact that in general the

registration for her departmental courses consistently exceeds the average for the department, indeed for foreign languages in general. In addition she developed and taught this semester with Dr. Matas from Hispanic Languages an extremely popular and successful course on Modern Theater for the Comparative Literature Program. Here we should note the very positive and enthusiastic letters of recommendation she has received from members of the CLP; it is clear they regard her as an important asset to the Program. Beyond this, she has in the past and continues to give every indication of an energetic involvement in pedagogic and cultural activities at the University (her work with local theater, her proposed course for Women's Studies, etc.)—all of which indicate a value to the University which extends beyond her immediate relevance to her department. It is hard to imagine what a "unique contribution" might ultimately be but it is clear that Dr. Hellman's concrete pedagogic effectiveness has been original and substantial. In short, we tend to agree with an earlier assessment by Dean Rosenberg himself (letter to Peake, June 9, 1971) that "she has handled both undergraduate and graduate courses with enthusiasm, vigor and intelligence."

3. Departmental Support

This is perhaps the murkiest area of the case. We note in passing that Dr. Hellman has been subjected to what the committee as a whole agrees is a highly irregular form of triple jeopardy. What are the facts? Twice, before and during her probationary appointment as Associate Professor (Sept. 1, 1971-April 3, 1973), her department voted with virtual unanimity to recommend her for tenure (7-0, 1 abstention on March 3, 1971 and 8-0, 1 abstention on Dec. 12, 1972). These votes are unusual in one important respect despite the consensus indicated. Dr. Hellman was initially hired as a Mellon Fellow. There was no need for her to be entered into the tenure

stream; thus, it was only *after* she has displayed in her work as a Fellow what must be considered an impressive quality did her department move for a tenured appointment (which resulted in the probationary appointment) and then re-confirm its support later. Now it is clear that the considerations regarding budgeting and "slots" were *already apparent to her colleagues in the period between the two votes,* since they were stipulated by Dean Rosenberg in dealing with the first tenure recommendation (that is, in academic 71-72 and not in 72-73 with the contingency of the new chairman as had been suggested in some of the testimony). With this knowledge, her colleagues voted to reaffirm their initial decision. This factor cannot be stressed too highly; it constitutes a most impressive index of support for Dr. Hellman's *concrete* value to the department in its new budgetary situation.

Now, as to the "third" so-called vote of Oct. 24, 1972 which, strangely, resulted in a 5-3 decision to support the Dean's decision to deny tenure. This vote resulted from Dr. St. Aubyn's precipitous and incorrect understanding of a request by the chairman of our committee to sense out departmental attitudes on the Hellman case and was admitted "informal," i.e. not having the status of an official departmental recommendation. Testimony we have received indicates that it was conducted in great haste, under unusual pressures (e.g., "pressures for unity" around the new chairman who felt himself implicated) and with at least two tenured supporters of Dr. Hellman absent. Despite this irregularity, however, the vote was intended to indicate to us in a compelling way that given some unexplained new "understanding" of the budgetary situation, support for Dr. Hellman had eroded (i.e., the faculty considered it had higher priorities in allocating upcoming tenure slots). It is crucial, however, that Dr. Koch, who had as the previous chairman worked hard to obtain tenure for

Dr. Hellman, was absent on leave and not consulted. Further, one voting member who had supported her previously had died in the interim unexpectedly (Dr. Mitchell). We have to assume Dr. Koch would have argued persuasively and voted here for tenure. More significant, perhaps, given his reputation as a "rising star" in Italian and Comparativist studies, Dr. Wlassics, who was also on leave and not consulted has written to our committee to indicate that he recommends Dr. Hellman highly and would have supported her both by argument and vote if he had been consulted. When these facts are taken into account we get the picture that either a majority of the department *still favors* Dr. Hellman. Moreover, who can tell how the support and prestige of Dr. Koch and Dr. Wlassics might have affected the judgment of their colleagues with respect to Dr. Hellman? Consequently, we tend to give little credence to this third "vote" and still consider the first two as indicative.

4. Affirmative Action and General Considerations

We are all familiar with the many directives concerning Affirmative Action on hiring, retention and promotion of women in scholarly positions. Yet here confronted with a concrete case we discover a paradox. Obviously, Affirmative Action alone is no criterian for tenure; one would be quite right in complaining about being "bullied into mediocrity" if this were the case. Nevertheless, we were presented with the unusual spectacle of a male member of the French Department, Dr. Hicks, *being granted tenure* in a situation comparable to Dr. Hellman's while our deliberations were proceeding. Now we claim neither the right nor the competence to comment on the merits of the Hick decision. We do, however, understand it as setting a *precedent* in relation to Dr. Hellman's case. What are the relevant issues? Dr. Hellman's published work is held to be less than a brilliant contribution to scholarship, yet Dr. Hicks has apparently published nothing

more than a book review. Dr. Hicks has been evaluated as an unusually good teacher; yet so has Dr. Hellman and over a larger range of courses. Dr. Hicks is said to be essential to the department since he "fills a hole" in 17th Century studies; yet the department has abandoned the period structure in favor of field and quality. Dr. Hicks was narrowly supported for tenure by his colleagues in a vote (so we understand) of 5-4; Dr. Hellman has twice been confirmed in different circumstances with virtual unanimity. Surely we must all agree that there is something funy here. More to the point: in a situation in which the University as a whole is under instruction to hire and retain qualified women, a woman who is a demonstrably qualified scholar and teacher in her field is being denied tenure at the same time that a male professor in her department with equivalent or lesser qualifications has been granted tenure.

Finally, it seems important to recall a remark one of the witnesses for Dr. Hellman made: despite her age, she is quite literally *at the beginning of her scholarly career.* It is easy to forget this. The completion of her thesis lies not so many years in the past; her problems with revision seem the normal lot of academic manuscripts and not some failure to pour life into old and dead material. In the process, she has published an impressive number of articles for such a recent scholar and has attracted considerable attention from recognized experts in the field. Moreover, her previous life before undertaking an academic career seems, if anything, one of the strongest assets she brings to her teaching, her department and the University. We refer to her education with central figures in modern Ameri-

can culture (Charles Olson and the Black Mountain group), her considerable experience in the practical world of the performing arts, the numerous friends and contacts in this world that she brings into relation with her work here. We cannot help but feel, in conclusion, that tenure for Dr. Hellman is not simply a matter of an abstract right or a "luxury" but of simple, practical academic good sense.

John Beverley, Hispanic languages
/s/ JOHN BEVERLY
David Bramhall, Economics
Emily Coleman, History

March 1, 1973

Professor Helen Hellman
125 S. Fairmont Street
Pittsburgh, PA 15206

Dear Helen:

I have been giving very careful consideration to the various reports which I received from the Tenure and Promotion Review Panel in the matter of your appeal. In the light of these recommendations as well as the sum total of all information and judgments made available to me in this matter, I have decided to let my original decision stand, not to recommend that your appointment at the University of Pittsburgh be extended beyond April 30, 1973.

Sincerely yours,
Jerome L. Rosenberg
Dean

JLR:db

Carbon Copy
F. St. Aubyn

CERTIFICATE OF SERVICE

I, STANLEY M. STEIN, hereby certify that a true and correct copy of the foregoing Appendix to Petition for Certiorari has been served on counsel of Appellees as follows:

James J. Restivo, Jr., Esq.
Martha H. Munsch, Esq.
Michael J. Betts, Esq.
Reed, Smith, Shaw & McClay
747 Union Trust Building
Pittsburgh, PA 15219

Said copy was served by hand delivery on the *8th* day of May, 1985.

/s/ STANLEY M. STEIN
Stanley M. Stein, Esq.
Attorney for Appellant